

**2664A OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A COMBINATION OF AN INTOXICANT AND A CONTROLLED SUBSTANCE — CIVIL FORFEITURE — § 346.63(1)(a)**

**Statutory Definition of the Crime**

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway<sup>1</sup> while under the influence of a combination of an intoxicant and a controlled substance.

**Burden of Proof**

Before you may find the defendant guilty of this offense, the (identify prosecuting agency)<sup>2</sup> must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

**Elements of the Offense That Must Be Proved**

1. The defendant (drove) (operated) a motor vehicle<sup>3</sup> on a highway.<sup>4</sup>

[“Drive” means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]<sup>5</sup>

[“Operate” means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]<sup>6</sup>

2. The defendant was under the influence of a combination of an intoxicant and (name controlled substance)<sup>7</sup> at the time the defendant (drove) (operated) a motor vehicle.

[(Name controlled substance) is a controlled substance.]<sup>8</sup>

### **The Definition of “Under the Influence”**

“Under the influence” means that the defendant’s ability to operate a vehicle was impaired because of consumption of a combination of an alcoholic beverage and a controlled substance.<sup>9</sup>

[Not every person who has consumed alcoholic beverages and controlled substances is “under the influence” as that term is used here.]<sup>10</sup> What must be established is that the person has consumed a sufficient amount of alcohol or of a controlled substance or both to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person’s ability to safely control the vehicle be impaired.

### **How to Use the Test Result Evidence**

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, ADD THE FOLLOWING.<sup>11</sup>

[The law states that the alcohol concentration in a defendant’s (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant’s alcohol concentration at the time of the (driving) (operating). An analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant’s blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant’s breath] at the time the test was taken may be considered by

you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding an alcohol concentration test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED<sup>12</sup> AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"<sup>13</sup> THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating), unless you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:<sup>14</sup>

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

### **Jury's Decision**

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 2664A was originally published in 1986 and revised in 1993, 2004, 2005, and 2020. This 2020 revision added to the Comment. See footnotes 7 and 8 below. This revision was approved by the Committee in December 2021; it added suggested language concerning test results showing 0.08 grams or more in the defendant's blood.

This instruction is for a first offense under § 346.63(1)(a), involving the combined influence of an intoxicant a controlled substance. For offenses involving operating under the influence of a controlled substance alone, see Wis JI-Criminal 2664. For offenses involving operating under the influence of "any other drugs," see Wis JI-Criminal 2666.

Wisconsin case law interpreted earlier versions of the drunk driving statutes in a way that would seem to cover situations involving the combined influence of alcohol and controlled substances or drug. Waukesha v. Godfrey, 41 Wis.2d 401, 406, 164 N.W.2d 314 (1960), cited with approval a Pennsylvania case holding that:

If liquor shares its influence with another influence and is still the activating cause of the condition

which the statute denounces it can be truthfully said that the driver was under the influence of liquor. Commonwealth v. Rex (1951), 168 Pa. Super. 628, 632, 82 Atl.2d 315.

The Godfrey rule also applies to situations where an intoxicant combines its influence with medication or where a person's poor health or physical condition reduces tolerance to alcohol. 41 Wis.2d 401, 407.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes of individual instructions. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the “on a highway” requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.
2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.
3. Regarding the definition of “motor vehicle,” see Wis JI-Criminal 2600 Introductory Comment, Sec. II.
4. Regarding the “on a highway” requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.
5. This is the definition of “drive” provided in § 346.63(3)(a).
6. Regarding the definition of “operate,” see Wis JI-Criminal 2600 Introductory Comment, Sec. III.
7. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been in the defendant's blood is not listed in Chapter 961. For example, if the substance is heroin, “heroin,” should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), “synthetic cannabinoid” should be used throughout the instruction, not the specific variation alleged to have been in the defendant's blood. Section 340.01(9m) provides that for purpose of the Vehicle Code, “controlled substance” has the meaning specified in § 961.01(4), which provides: “‘Controlled substance’ means a drug, substance or immediate precursor included in schedules I to V of sub. II.” The schedules are found in §§ 961.14, 961.16, 961.18, 961.20, and 961.22.
8. It is helpful to instruct the jury that any statutorily listed controlled substance is a “controlled substance,” as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: “Cocaine is a controlled substance.”

In contrast, if the evidence shows that the defendant's blood tested positive for “5F-AMQRZ,” a non-statutorily listed synthetic cannabinoid, the jury should be instructed: “A synthetic cannabinoid is a controlled substance,” not that “5F-AMQRZ” is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

9. This definition of “under the influence” is adapted from the one used for offenses involving alcoholic beverages. See Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The sentence in brackets is appropriate for cases involving the consumption of substances which are roughly similar in their effect on a person as alcohol. That is, a person could use some substances in a limited degree and, like the person who consumes a limited amount of alcohol, not be “under the influence” as that term is used here.

Some controlled substances, however, have such extreme effects that the sentence in brackets should not be used.

11. It may be that cases will be charged under § 346.63(1)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range “is relevant evidence on intoxication . . . but is not to be given any prima facie effect.”

12. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the “blood alcohol curve,” see Wis JI-Criminal 2600 Introductory Comment, Sec. VII., C.

14. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.